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CURRENT TOPICS.

In the United States Circuit Court for the District of Massachusetts, in the recent case of *United States v. Elliot*, it was held that an information in the nature of debt will lie in the Federal courts to recover a penalty, although the amount of the penalty is not certain, as where the penalty is for not less than a certain amount, or not more than a certain other amount. LOWELL, J., said: "It is well settled that when pecuniary penalties are affixed by statute to an act or a neglect, and there is no imprisonment provided for, or other reason to suppose that a mere punishment is intended, and no special remedy is pointed out in the statute, a civil action (formerly always 'debt') will lie for their recovery, although the penalties are for the sole use of the sovereign. Rolle Abr. 598, pl. 18, 19; Jacob v. United States, 1 Brock. 520. When the practice of the courts of the United States first adopted that of the several States, penalties could be so recovered in Massachusetts. When the sovereign was interested in the penalty, it might be recovered, in England, by information in the nature of debt, which in revenue cases was brought in the Exchequer, but in others in any of the king's courts. If an informer was interested, his rights were established by the decree. Attorney General v. Hines, Parker, 182; United States v. Lyman, 1 Mason, 482; Rook's Case, Hard. 20; Roe v. Roe, Ib, 184; Rex v. Clark, Cowp. 610; Butler v. Butler, 1 East, 338; 1 Vice Ad. Rec. (Mass.) 56; 18 Ib. 27. I assume, therefore, that where debt will lie, the United States may have an information, unless the recent practice act has changed the rule. It is, in my opinion, the law of this country that debt will lie, though the amount of the penalty is uncertain. See the able judgment of Washington, J., in United States v. Colt, Pet. C. C. 145, the reasoning of which was adopted and enforced by the Supreme Court, though not in a case upon a statute. Hughes v. Ins. Co., 8 Wheat, 294; Rockwell v. Ohio, 11 Ohio, 130; United States v. Allen, 4 Day, 474. In Dane Abr. c. 148, art. 9, § 5, it is said, that for the many penalties and forfeitures enacted by Congress, of not less than so much or more than so much, debt is generally the proper remedy. In 1795 an action of debt was sustained in Massachusetts for an uncertain penalty, and the court assessed the amount. Eddy v. Oliver, Dane Abr. c. 148, art. 11, § 3. In Commonwealth v. Stevens, 15 Mass. 195, a similar action was sustained; the statute is not cited, but it must have been St. 1809, c. 108, § 34, art. 21, which imposes a penalty of not less than five nor more than twenty dollars for each offence. I do not think that the practice act (Rev. Sts. § 914) intends to deprive the United States of the right to file an information instead of bringing an action, although informations for this precise cause of action are not now brought in Massachusetts. The provision of § 3213, that any proper form may be adopted, though by its context it is probably to be confined to penalties accruing under the internal revenue laws, expresses what I think is the intent of the legislature. The government must conform substantially to the practice of Massachusetts; that practice still admits civil informations, though not for penalties; and if an informer sues *qui tam*, he should sue in tort; and I agree with the district attorney, that the information, which is the king's action, should be treated as in the nature of an action of tort. The declaration avers that an action has accrued for not more than certain sums. Mr. Justice Washington remarked, in United States v. Colt, Pet. C C. 184, that the declaration should demand a precise sum, and leave the court or jury to assess a lesser amount if they saw fit. This remark was more particularly applicable to an action of debt; but even in tort you demand a certain sum."

In *Boone County v. Jones*, decided by the Supreme Court of Iowa, on the 23d ult., in an action upon a county treasurer's bond, the books of the officer showed a settlement and an accounting to the supervisors of the cash shown to be in his hands, made at the time the bond in question was given. This settlement showed that the officer was not then a

defaulter but that he had on hand at that time all the money he was required to have. The defendant offered to show that at the time the bond was given the officer was in fact a defaulter, there really having been a deficit in his accounts at the time he made the settlement. This evidence was held to be inadmissible on the ground that the sureties were bound by the settlement and were estopped from showing that a defalcation existed before the bond was given. The court said: "Counsel for appellant cite a large number of authorities to the effect that where an official bond is not retrospective, the sureties thereto are only bound for the public moneys in the hands of the officer when the bond was executed, and for that which subsequently came into his possession, and cannot be held for past derelictions of duty by their principal. That the proposition is correct can admit of no question. It has been repeatedly so held by this court. Mahaska Co. v. Ingalls, 16 Iowa, 81; Bessinger v. Dickerson, 20 Iowa, 261; Warren Co. v, Ward, 21 Iowa, 84; School Dist. v. McDonald, 39 Iowa, 564. But the question we are called upon to determine in this case, is the admissibility of the offered evidence to show the fact as to when the defalcation or embezzlement occurred. In State v. Grammer, 29 Ind. 531, it is said: 'It is true that the sureties of a public officer, in the absence of special agreement, are only liable for a defalcation of their principal during the term of office covered by the bond; but what shall be received as proof of such defalcation is quite another question." In determining the question as to whether the officer and his sureties should be estopped from contradicting the reports of the treasurer, and the settlements made by him with the board of supervisors, we are controlled largely by the statute in force in this State requiring such settlements to be made. Upon a careful examination of the authorities cited by counsel for appellants we have found no case exactly in point. They are for the most part cases which determine the general proposition that a surety is not liable for derelictions of his principal before the date of the bond, and the question of estoppel, based upon settlements with the officer, does not appear to have been under consideration. We have seen that the law requires the settlements to be made with the treasurer in January and June of each year. Suppose that he should refuse to make such settlement, or it should appear by an examination of his books and the counting of his cash, that he was a defaulter, he would be liable to be removed from office. Code § 746. He would also be liable to prosecution for the crime of embezzlement. Now suppose at the time of settlement he should show by his books and by the money in the vaults of the treasury that he was not a defaulter, has the county the right to rely upon such showing, or can he, by false statements of accounts, or by borrowing money temporarily to be counted in settlement, mislead the board of supervisors and avoid proceedings against him, or possibly the demand of an additional bond, and then, when sued upon his bond, show that his settlement was a fraud upon the county, and that the defalcation actually occurred during a former term? We are clearly of the opinion that he can not. By allowing such contradictions of these settlements, courts would open the doors to escape from liability upon almost every official bond. By shifting the defalcation back to a former term the statute of limitations would in most cases preclude all hope of recovery, unless where a defaulting treasurer, who has held successive terms, should be sued upon all his bonds, and then the shifting process could well be applied to each case. We think the question has every element of estoppel, and that to hold such evidence competent would not only be to allow the treasurer to take advantage of a wrong by which he deceived the county to its injury, but would be contrary to public policy." In Baker v. Preston, 1 Gilm. 235, a proceeding against a defaulting treasurer and his sureties, it was held that the books kept by the treasurer were conclusive evidence of the balance actually in the treasury at any given time, both against the treasurer and his sureties, without being pleaded as an estoppel, so as to charge them with balances carried forward from year to year. See, also, State v. Grammer, 29 Ind. 530; Morley v. Town of Matamora, 78 Ill. 394; and Gage v. The City of Chicago, 2 Bradwell, (Ill.) 332; McCabe v. Raney 32 Ind. 309.

THE DEGREES OF HOMICIDE.

In addition to the recent amendments to the law of homicide in this State, made in the revision of 1879 which went into effect on the first day of last month, and which were mentioned in our last number, there have been several others no less important which it is proposed to present in this place.

It has always been supposed that the defendant could be convicted of any degree of homicide which could be legally carved out of the facts charged in the indictment and proved on the trial; that the unlawful killing was the principal fact, and the condition of the mind or attending circumstances determined the degree or grade of the offense, and when the greater of the degrees had been committed, the less had also, it being necessarily involved as a constituent part of the higher crime; and therefore a conviction of murder in the second degree or of manslaughter could be legally sustained, although the evidence made a case of murder in the first degree. Com. v. McPike, 3 Cush. 181: Landers v. State, 12 Tex. 462; 4 Bl. Com. 336; 12 Pick. 504; Barnet v. People, 54 Ill. 325; 1 Bish. Cr. L. 6 ed. § 792, 780, 791, 786, and see 6 Cent. L. J. 183, and cases cited. But the Supreme Court of Missouri have held that each and every degree of homicide as declared by statute should be considered distributively as so many distinct offenses, and that the greater does not include the less, and therefore a conviction of a lower degree or offense will not be sustained when the evidence proves a higher degree or offense. State v. Alexander, 66 Mo. 148; State v. Mahley, 68 Mo. 315.

If this is a correct interpretation of the statute, it is very unfortunate that the plain classification of homicide into two divisions, *viz.*: murder and manslaughter, by the common law, was ever disturbed; for the effect of this construction in its practical operation has been to secure the acquittal of a number of persons who were actually guilty of murder. On the trial, for instance, through a misapprehension of the law or facts, a defendant was convicted of murder in the second degree or of some degree of manslaughter which was an acquittal of every higher degree of homicide, and upon appeal the Supreme Court, taking a different view of the matter, and concluding that the defendant was guilty of a higher degree than that of which he was convicted, would reverse the case. The defendant can not be tried again for such higher degree or offense, and therefore must be discharged, not because he was not guilty of the offense of which he was convicted, but because he was guilty of a greater crime, also, and the State imposed upon him a less punishment than the full measure of his crime merited. This construction of the law was so shocking to every sense of justice that it could not long remain after it became generally known, without an effort to bring about a more reasonable rule of practice. The attention of the revisers of the criminal code was called to the matter. The difficulty could only be met by changing the law, which might lead to other embarrassments and involve new constructions more objectionable than the one complained of. It was supposed that it could be done by abolishing all degrees of homicide and returning to the common law distinction between murder and manslaughter, and giving a wide range in the punishment, or it might be done by amending the law in such a way as to aid the court in establishing a different rule of construction. The latter course was adopted in the revision of 1879, but with what propriety or result remains to be seen.

At common law, malice was the only test of murder; that is, an unlawful killing with malice aforethought was murder, and such killing without malice was manslaughter—the question of malice being the point of distinction between murder and manslaughter. This distinction is the only one that the wisdom of ages deemed it advisable to make. The result of the experience of careful investigation and practical application of general principles for centuries, by the best legal minds of England, has been a few outlines or landmarks to aid in discovering and punishing the crime of destroying human life, with as few definitions as possible, and no arbitrary rules or statutes to hold the government to the proof of some specific measure of guilt in every case, but leaving every case to fall within the general definition of criminal homicide, and on one side or other of the dividing line. The Missouri statute, in dividing murder into two degrees, and dividing and defining manslaughter in four degrees, is at best a measure of

doubtful expediency, and especially unfortunate under the construction given to it by the Supreme Court, ignoring as that court does the universally recognized principle that the lower degrees are included in the higher, and may be punished notwithstanding the evidence proves the higher degree. Dividing one general description into two or carving out of one general description many specific descriptions, complicates instead of simplifying, in the ratio that the number of descriptions are increased, because in addition to finding the facts which bring the case under the general description or definition, a discrimination between the different specific ones carved out of it is also involved. It might be easy enough to refer a case to a general description of a crime, when it would be exceedingly difficult to refer it to any one of two or more special descriptions taken from and comprehended within the general one. The best trained legal minds are not always able to agree as to the particular class or crime a given case belongs, and of course the inexperienced are often in error in regard to such a matter; but if the error should simply abate the severity of the punishment and not wholly defeat the ends of justice it would be received as a "yielding to the claims of mercy," and the public mind would be satisfied. It is but a license or encouragement of crime by rendering conviction almost impossible, to split criminal homicide up into so many descriptions or definitions, to be narrowly and technically considered as distinct offenses instead of degrees of one offense when the greater has been committed; and the action of the legislature last winter in providing several amendments, which will be noticed presently, shows that such a construction was never anticipated and is not to be tolerated if it can be avoided. Some good lawyers then thought that it would be better, in view of the construction put upon the statute by the Supreme Court in State v. Alexander, 66 Mo. 148, and State v. Mahley, 68 Mo. 315, to abolish all degrees of homicide and return to the common law distinction between murder and manslaughter, and give such latitude in the punishment that a person could be punished according to the magnitude of the offense; and for the additional reason that the law would be more logical, less complicated, easier understood and more certain of execution, for the more degrees and definitions in relation to the same subject the more technical dictinctions and nice discriminations in applying the facts to the law. With only the common law distinction between murder and manslaughter, the jury would be relieved in many cases from all doubt and embarrassment in endeavoring to ascertain the particular degree of the offense, and could temper the punishment with a "leaven of mercy" when the circumstances called for it.

It is therefore provided by statute that upon the trial of an indictment for murder in the first degree, the jury must inquire and by their verdict ascertain under the instructions of the court whether the defendant be guilty of murin the first or second degree, etc. R. S. 1879, §1234. It is supposed that under this statute it will be the duty of the court in every trial of murder in the first degree to define both degrees of murder, and leave it to the jury to determine from the evidence the particular degree of which the defendant is guilty, if guilty of either. If the evidence does not make out a case of murder in either degree, the court should not submit the question as to his guilt of either to the jury, but should direct their attention to the degree of homicide which the evidence tends to establish.

It is also provided by statute that upon an indictment for any offense consisting of different degrees, the jury may find the accused not guilty of the offense charged in the indictment, and may find him guilty of any degree of such offense inferior to that charged in the indictment, or of an attempt to commit such offense or any degree thereof; and any person found guilty of murder in the second degree or of any degree of manslaughter shall be punished according to the verdict of the jury, although the evidence in the case shows him to be guilty of a higher degree of homicide. R. S. 1879, §1654. The latter clause of this section may be considered as an attempt to construe the different provisions of the statute dividing criminal homicide into degrees, so that the greater shall include the less, and when a person commits the higher crime he commits the lower also, and therefore he may be properly punished for the lower degree, for it does not lie in the mouth of a criminal to say what part of his criminal act or what degree of his crime shall

be imputed to him and for which he shall suffer.

It is further provided that upon an indictment for an assault with intent to commit a felony, or for a felonious assault, the defendant may be convicted of the lesser offense, and in all other cases, whether prosecuted by indictment, information or before a justice of the peace, the jury or court trying the case may find the defendant not guilty of the offense as charged and find him guilty of any offense the commission of which is necessarily included in that charged against him. R. S. 1879, § 1655. This is a new provision, very broad and comprehensive in its terms. It will secure many convictions for the State where but for it there would be acquittals, and it will relieve defendants from excessive punishment in many cases where the jury would not be willing to acquit. If the case be an assault with intent to commit a felony, or for a felonious assault, and the evidence does not establish the felonious intent or felonious assault, but does prove an assault or assault and battery, the defendant may be convicted of such offence, a misdemeanor only. He could not, however, be convicted of an assault with intent to commit an offence, if such offence were actually committed, for in that case the assault is merged in the greater offence; at least the statute forbids such a conviction. Id. § 1646. But where the offense consists of different degrees, the greater including the less, or where the offense consists of two or more distinct facts as essential ingredients thereof, and which when combined or united make a particular crime, any such fact, which if it stood alone would constitute a distinct offense, would be regarded as necessarily included in the offense charged, and for such offense the defendant may be convicted. Moreover, the defendant should be convicted in every case of whatever offense the evidence shows him to be guilty, when it may be done under the indictment; for a defendant once tried and convicted or acquitted can not be afterwards convicted of a different degree of the same offense, nor of an attempt to commit the offense or any degree thereof, nor of any offense necessarily included therein, provided he could have been legally convicted of such degree, attempt or offense on the first indictment. R. S. 1879, § 1656; 67 Mo. 41; 66 Mo. 372; 62 Mo. 592.

It is further enacted by the statute of jeofails that no trial, judgment or other proceedings upon an indictment or information shall be stayed, arrested or in any manner affected * * * for any error committed at the instance or in favor of the defendant; nor because the evidence shows or tends to show him to be guilty of a higher degree of the offense than that of which he is convicted. R. S. 1879 §1821.

The obvious purpose of all these amendatory provisions pointing to the same object, is to secure a proper enforcement of the laws and punish the guilty, if not for the full measure of his crime at least for some part of it.

H. S. K.

CONSTITUTIONAL LAW—TAXATION OF BONDS.

KIRTLAND v. HOTCHKISS.

Supreme Court of the United States, October Term, 1879.

1. WHERE A STATE BY ITS SYSTEM OF TAXATION does not entrench upon the legitimate authority of the general government, or violate any right recognized or secured to the citizens by the Constitution of the United States, the Supreme Federal Court, as between the citizen and his State, can afford no relief against State taxation, however unjust, oppressive or onerous it may be.

2. THE CONSTITUTION OF THE UNITED STATES does not prohibit a State from taxing, in the hands of one of its resident citizens, a debt held by that citizen upon a resident of another State, such debt being evidenced by the bond of the debtor, and the payment being secured by deed of trust or mortgage upon real estate situated in the State in which the debter resides.

In error to the Supreme Court of Errors, Litchfield County, State of Connecticut.

Mr. Justice HARLAN delivered the opinion of the court:

We will not follow the interesting argument of counsel by entering upon an extended discussion of the principles upon which the power of taxation rests under our system of constitutional government. Nor is it at all necessary that we should now attempt to state all the limitations which exist upon the exercise of that power, whether such limitations arise from the essential principles of free government or from express constitutional provisions. We restrict our remarks to a single question, the precise import of which will appear from a brief statement of the more important facts of this case.

The plaintiff in error, a citizen of Connecticut, instituted this action for the purpose of restrain

ing the enforcement of certain tax-warrants levied upon his real estate in the town in which he resided, in satisfaction of certain State taxes, assessed against him for the years 1869 and 1870. The assessment was by reason of his ownership during those years, of certain bonds executed in Chicago, and made payable to him, his executors, administrators or assigns in that city, at such place as he or they should by writing appoint, and, in default of such appointment, at the Manufacturers' National Bank of Chicago. Each bond declared that, "it is made under, and is, in all respects, to be construed by the laws of Illinois, and is given for an actual loan of money, made at the city of Chicago, by the said Charles W. Kirtland to the said Edmund A. Cummings, on the day of the date hereof." They were all secured by deeds of trust executed by the obligor to one Perkins, of that city, upon real estate there situated, the trustees having power, by the terms of the deed, to sell and convey the property and apply the proceeds in payment of the loan, in case of default on the part of the obligor to perform the stipulations of the bond.

The statute of Connecticut, under which the assessment was made, declares, among other things, that personal property in that State, 'or elsewhere,' should be deemed, for purposes of taxation, to include all moneys, credits, choses in action, bonds, notes, stocks (except United States stocks), chattels or effects, or any interest thereon; and that such personal property, or interest thereon, being the property of any person resident in the State should be valued and assessed at its just and true value, in the tax-list of the town where the owner resides. The statute expressly exempts from its operation money or property actually invested in the business of merchandising or manufacturing when located out of the State. Conn. Revision of 1866, p. 709, title 64, chap. 1, sec. 8. The highest court of the State held that the assessments complained of were in conformity to the State law, and the law itself did not infringe any constitutional right of the plaintiff. This writ of error is prosecuted upon the ground, as asserted by the plaintiff, that the statute of Connecticut, thus interpreted and sustained by its highest court, is repugnant to the Constitution of the United States.

In McCulloch v. State of Maryland, 4 Wheat. 428, this court considered very fully the nature and extent of the original right of taxation which remained with the States after the adoption of the Federal Constitution. It was there said "that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it." Tracing the right of taxation to the source from which it was derived, it was further said: "It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation." "This vital power," said this court in Providence Bank v. Billings, 4 Pet. 563, "may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State government. The interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security, when there is no express contract, against unjust and excessive taxation, as well as against unwise legislation." In St. Louis v. Ferry Company, 11 Wall. 422, and in State Tax on Foreign-Held Bonds, 15 Wall. 319, the language of the court was equally emphatic. In the last-named case we said that, "unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

We perceive no reason to modify the principles announced in these cases, or to question their soundness. They are fundamental and vital in the relations which, under the Constitution of the United States, exist between the Federal and State governments. Upon their strict observance depends, in no small degree, the harmonious working of our complex system of government, Federal and State. It may, therefore, be regarded as the established doctrine of this court, that so long as the State, by its system of taxation, does not entrench upon the legitimate authority of the Union, or violate any right recognized or secured to the citizen by the Constitution of the United States, this court, as between the citizen and his State, can afford no relief against State taxation, however unjust, oppressive, or onerous. Plainly, therefore, our only duty is to inquire whether the Federal Constitution prohibits a State from taxing, in the hands of one of its resident citizens, a debt held by that citizen upon a resident of another State, such debt being evidenced by the bond of the debtor, and the payment of the debt or bond secured by deed of trust or mortgage upon real estate situated in the State in which the debtor resides.

The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt which he holds against the resident of Illinois is property in his hands. 15 Wall. 320. It constitutes a portion of his wealth, and from that wealth he is under the very highest obligation, in common with his fellow-citizens of the same State, to contribute for the support of the government whose protection he enjoys. The debt in question, although a species of intangible property, may, for purposes of taxation, if not for all purposes, be regarded as situated at the domicil of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is at best only evidence of the debt, not the debt itself. The bond may be destroyed, but the debt

—the right to demand the repayment of the money loaned, with the stipulated interest—remains. Nor is the locality of the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt, and, as held by this court in 15 Wall. 323, already cited, the right of the creditor "to proceed against the property mortgaged, upon a given contingency, to enforce by its sale the payment of his demand, * * has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein," &c. Cooley on Taxation, 15, 63, 134 and 270. The debt in question, then, having its *situs* at the creditor's residence, and constituting a portion of his estate there, both he and the debt are, for purposes of taxation, within the jurisdiction of the State. It is consequently, for the State to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of taxation, to maintain its government. Its discretion in that regard is beyond the power of the Federal government in any of its departments to supervise or control, for the reason, too obvious to require argument in its support, that such taxation violates no provision of the Federal Constitution. Manifestly it does not, as is supposed by counsel, interfere in any true sense with the exertion by Congress of the power to regulate commerce among the several States. 8 How., 80; Cooley on Taxation, 62. Nor does it, as is further supposed, abridge the privileges or immunities of citizens of the United States, or deprive the citizen of life, liberty, or property without due process of law, or violate the constitutional guaranty that the citizens of each State shall be entitled to all privileges of citizens in the several States.

Whether the State of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns only the people of that State, and with which the Federal government can not rightfully interfere.

Judgment affirmed.

SUICIDE IN LIFE INSURANCE — SANE OR INSANE.

ADKINS v. COLUMBIA LIFE INS. CO.

Supreme Court of Missouri.

[Filed Nov. 17, 1879,]

A clause in a life insurance policy provided that "in case of the death of the insured by his own act or intention, sane or insane," the company should not be liable for the sum insured, but only for the net value of the policy at the time of the death: *Held*, that the above provision avoided the risk as to the sum insured in the case of an intentional self destruction by an insane man, *i. e.*, if the assured, at the time of causing his own death, was conscious of the physical nature and consequences of his act, and intended to put an end to his own life, although he was not conscious of the moral quality or criminality of such act.

Appeal from the Circuit Court of Henry County.

Waldo P. Johnson, for appellant; *F. E. Savage* and *W. L. Stewart*, for respondents.

HOUGH, J., delivered the opinion of the court:

This was an action on a policy of insurance issued to the plaintiff on the life of her husband, Henry G. Adkins. It appears from the agreed statement on which this cause has been submitted, that said Adkins committed suicide; "that at the time he committed suicide he was insane; that his mind was so far impaired that he did not understand the moral character, the general nature and consequences of the act; that the act of self-destruction was the result of his insane condition of mind."

The policy sued on contains the following clause and exception, to-wit: "Provided always and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these express conditions: That in case of the death of said insured by his own act and intention, whether sane or insane, or by the use of intoxicating drinks, opiates, or narcotics, it is expressly stipulated and agreed by all parties in interest that the company shall not be liable for the sum insured by the said policy, but the company will pay, and the parties in interest will accept in full discharge and satisfaction of said policy, a sum equal to the net value of this policy at the time of death of said insured, computed on the American table of mortality with interest at six per cent." The defendant admitted it was liable for the net value of the policy at the time of the death of the insured, and tendered the same in court with costs which was refused. The plaintiff recovered judgment for the full amount of the policy, and the defendant has appealed.

The rights of the parties depend upon the meaning to be attached to the words "in case of the death of said insured by his own act and intention, whether sane or insane," contained in the clause of the policy above quoted.

In the leading case of Borradaile v. Hunter, 5 Man. & Gr. 639, the words avoiding the policy were, "in case the assured shall die by his own hands." The court declared these words to be equivalent to the words "shall die by his own act," and held that as the assured had intentionally destroyed himself, though he was at the time incapable of distinguishing between right and wrong, the policy was void. It appeared from the evidence in that case that Mr. Borradaile threw himself from the parapet of Vauxhall bridge into the river Thames and was drowned. Erskine, J., said the words of avoidance "were large enough to include all intentional acts of self-destruction, whether criminal or not; if the deceased was

laboring under no delusion as to the physical consequences of the act he was committing—if he knew that it was water into which he was about to throw himself and that the consequence of his leaping from the bridge would be his death; and if he voluntarily threw himself from the bridge into the river, intending by so doing to drown himself— the question whether he had, thereby been guilty of a crime, as *felo de se*, or whether if he had at that time destroyed the life of another instead of his own he was in a state of mind to be morally and legally responsible for his acts was irrelevant to the question before the jury; that the state of mind of the assured was only material for the purpose of ascertaining whether the act of self-destruction was a voluntary and wilful act for the purpose of destroying his life." This decision was afterwards followed in Clift v. Schwabe, 3 Man. Gr. & Scott, 438, and in Dufaur v. Professional Life Ins. Co., 25 Beav. 599. The rule thus established in England has been adopted in this country in the following cases. Dean v. Mutual Life Ins. Co., 4 Allen, 96; Cooper v. Mass. Mutual Life Ins. Co., 102 Mass. 227; Nimick v. Mutual Benefit Life Ins. Co., 1 Big. Cas. 689; Gay v. Union Mutual Life Ins. Co., 2 Id. 4, and Van Zandt v. Mutual Benefit Ins. Co., 55 N. Y. 169. The case of American Life Ins. Co. v. Isett, 74 Penn. St. 176, virtually supports the rule, but the case of Hartman v. Keystone Ins. Co., 21 Penn. St. 466, merely decides that if the insured committed suicide by swallowing poison, he died by his own hand. The rule is denied in Eastabrook v. Union Ins. Co., 54 Maine, 224, and in Life Ins. Co. v. Terry, 15 Wall. 580.

The case of Breasted v. Farmers Loan and Trust Co. 4 Seld. 299, has been cited by Mr. Justice Hunt in Life Ins. Co. v. Terry, as being in opposition to the rule laid down in Borradaile v. Hunter, but it has been satisfactorily shown by the Court of Appeals of New York in Van Zandt v. Mutual Benefit Life Ins. Co., that there is no real conflict between the cases. In the case of Life Insurance Co. v. Terry, the words of avoidance were, "shall die by his own hand," and the court held that these words referred to an act of criminal self-destruction only, and not to the voluntary death of one who did not realize or understand the moral quality of his act. The court said: "If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable."

The words "by his own act and intention," used in the policy before us are equivalent to the words "by his own hand," and as to the meaning to be given to these words when standing by themselves, there is, as an examination of the cases cited will show, an irreconcilable conflict of opinion; those on one side maintaining that the policy would be avoided if the assured at the time of causing his own death was conscious of the physical nature and consequence of his act, and intended thereby to put an end to his own life, and those on the other side maintaining that the policy would not be avoided unless the insured were also conscious of the moral quality or criminality of such act. The policy before us, however, goes further than any of those considered in the foregoing cases, and provides that it shall be void if the assured shall die "by his own act and intention, sane or insane." And if it be permissible for life insurance companies to insert such a stipulation in their policies, it is manifest that the only question which can arise thereon in the event of the suicide of the insured, is whether the act of self-destruction was intentional, or in the words of Erskine, J., whether it was "the voluntary and wilful act of a man having at the time sufficient powers of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by that act; and that the question whether he was at the time capable of understanding and appreciating the moral nature and quality of his purpose is not relevant to the inquiry, further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself."

The words "by his own act and intention" are, as has already been said, equivalent to the words of avoidance construed by the Supreme Court of the United States in the case of Life Insurance Co. v. Terry, and the addition thereto of the words "sane or insane" in the policy before us conclusively shows that it was the purpose of the defendant in this case to avoid the risk of intentional self-destruction by an insane man, and we are of the opinion that the addition of the words is adequate to the accomplishment of that purpose. It has been expressly so decided by the Supreme Court of the United States in a very lucid opinion by Mr. Justice Davis in the case of Bigelow v. Berkshire Life Ins. Co., 3 Otto, 284, 4 Cent. L. J. 53. To the same effect also are Pierce v. Travelers Life Ins. Co., 34 Wis. 389, and Chapman v. Republic Life Ins. Co., 5 Big. Cas. 110. The Commission of Appeals of New York in the case of De. Gogorza v. Knickerbocker Life Ins. Co., 65 N. Y. 232, go farther than the Supreme Court of the United States in the Bigelow case, and hold that a policy which provides that the insurer shall not be liable if the assured "shall die by his own hand or act, sane or insane" is avoided "if death enures from any physical movement of the hand or body of the assured proceeding from a partial or total eclipse of the mind."

The rule laid down by the Supreme Court of the United States in the Bigelow case is the rule which we think is properly applicable to the policy now under consideration, while the words "his own act and intention," have been construed to mean no more than the words " his own act," on the ground that the word "act" necessarily

implies intention. Chapman v. Republic Life Ins. Co. *supra*. Yet the addition of the word intention shows that the parties were solicitous to avoid all questions as to whether the policy was to be avoided by the physical act simply of the assured when unaccompanied by any corresponding intellectual purpose or act of the mind. Nor do we see any reason why a life insurance company may not stipulate against voluntary and intentional self-destruction. The courts have repeatedly recognized their right to stipulate against numerous kindred risks, and we see no difference in principle between stipulating against a voluntary death by poison or by violence, and voluntary death by opium or habitual drunkenness. In either case the avoidance of the policy proceeds upon the theory that it was within the power of the assured to avoid death by such instrumentalities and therefore his duty to do so.

There is some difficulty, however, in applying to the admitted facts of this case the construction which we have given to the language of the policy here sued on in consequence of a want of perspicuity in the language of Mr. Justice Hunt in Terry v. Life Ins. Co. heretofore quoted, a portion of which has been adopted by the parties to this suit as descriptive of the state of mind of the insured at the time of his death. We think with Rapallo J., in Van Zandt v. Mutual Ben. Life Ins. Co. *supra*, that this passage literally construed includes several conditions which can not coexist. We copy his comment: "It can be conceived that the act might have been voluntary and the self-destruction intentional, though the assured failed to appreciate its moral character, but it is difficult to conceive how the act could have been voluntary and intentional when the faculties of the deceased were so impaired that he was not able to understand the general nature, consequences and effect of the act he was about to commit, or when he was impelled thereto by an insane impulse which he had not the power to resist." In order to make the extract from the opinion of Mr. Justice Hunt consistent with itself the words, 'general nature, consequences and effect of the act' must be taken to be an amplification of the words 'moral character' immediately preceding and to refer to the moral nature, moral consequences and effect of the act; and the last alternative must be regarded as an independent statement of manner of the death of the assured because it is impossible that the death could be 'caused by the voluntary act of the assured" when he was 'impelled thereto by an insane impulse which he had not the power to resist.'" Besides this is evidently the construction put upon this passage by the Supreme Court of the United States in the subsequent case of Bigelow v. Berkshire Life Ins. Co. *supra*.

The language of the agreed statement denoting the state of mind of the assured having been adopted from the opinion in Terry v. Insurance Co. must be regarded as having been used by the parties in the sense in which it was employed in that opinion, and as it appears from such statement so construed that the mind of the assured was only so far impaired that he did not understand the moral quality and consequences of his act, it follows from the views we have expressed that the defendant is not liable for the full amount of the policy.

The judgment will therefore be reversed and the cause remanded, with directions to the circuit court to enter a judgment against the defendant for the net value of the policy at the time of the death of the insured. All concur.

NOTE.—See an article on "Suicide in Life Insurance —Sane or Insane," 4 Cent L. J. 51; Bigelow v. Berkshire Life Ins. Co. 4 Cent. L. J. 53; Knickerbocker Life Ins. Co. v. Peters, 2 Cent. L. J. 651.

TRADE MARKS — UNCONSTITUTIONALITY OF FEDERAL STATUTE.

UNITED STATES v. STEFFENS; SAME v. WITTEMANN; SAME v. JOHNSON.

Supreme Court of the United States, October Term, 1879.

1. TRADE MARKS — PROPERTY IN AT COMMON LAW.—The right to adopt and use a symbol or device to distinguish the goods or property made or sold by the person whose mark it is to the exclusion of the use of that symbol by all other persons, is a common law right, for which damages may be recovered in an action at law, and the violation of which will be enjoined by a court of equity with compensation for past infringement.

2. FEDERAL TRADE MARK ACTS UNCONSTITUTIONAL.—The statutes of the United States providing for the registration in the patent office of any device in the nature of a trade mark, to which any person has by usage established an exclusive right, or which the person so registering intends to appropriate by that act to his exclusive right, and making the wrongful use of a trade mark so registered by any other person without the owner's permission a cause of action in a civil suit for damages (act of July 8, 1870) and punishing by fine and imprisonment the fraudulent use, sale and counterfeiting of trade marks registered in pursuance thereof (act of August 14, 1876) are unconstitutional.

3. POWER TO PROMOTE ARTS AND SCIENCES. — The said legislation is not authorized by that clause of the Constitution giving power to Congress "to promote the progress of science and useful arts, by reserving for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Art. 1, sec. 8, cl. 8. A trade mark is neither a "writing" nor a "discovery."

4. POWER TO REGULATE COMMERCE.— Neither is said legislation authorized by the clause in the Constitution granting to Congress the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Art. 1, sec. 8, cl. 3.

5. WHETHER A TRADE MARK BEARS such a relation to commerce in general terms as to bring it within congressional control when used or applied to the classes of commerce which fall within that control, not decided.

6. CONSTRUCTION OF STATUTES — WHEN PARTS SEVERABLE. — Although when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable, so that each can stand alone, it is nevertheless not within its province to give to the words of a statute a narrower meaning than they were manifestly intended to bear, in order that crimes may be punished which are not described in language that bring them within the constitutional power.

On certificates of division in opinion between the judges of the Circuit Court of the United States for the Southern District of New York.

On a certificate of division in opinion between the judges of the Circuit Court of the United States for the Southern District of Ohio.

Mr. Justice MILLER delivered the opinion of the court:

The three cases whose titles stand at the head of this opinion are criminal prosecutions for violations of what is known as the trade-mark legislation of Congress. The first two are indictments in the Southern District of New York, and the last is an information in the Southern District of Ohio. In all of them the judges of the circuit court in which they are pending have certified to a difference of opinion on what is substantially the same question, namely: are the acts of Congress on the subject of trade-marks founded on any rightful authority in the Constitution of the United States.

The entire legislation of Congress in regard to trade-marks is of very recent origin. It is first seen in sections seventy-seven to eighty-four, inclusive, of the act of July 8, 1870, entitled, "An act to revise, consolidate, and amend the statutes relating to patents and copyrights." The part of this act relating to trade-marks is embodied in chapter two, title sixty, sections 4,937 to 4,947 of the Revised Statutes.

It is sufficient at present to say that they provide for the registration in the patent office of any device in the nature of a trade-mark to which any person has by usage established an exclusive right, or which the person so registering intends to appropriate by that act to his exclusive use; and they make the wrongful use of a trade-mark, so registered, by any other person, without the owner's permission, a cause of action in a civil suit for damages. Six years later we have the act of August 14, 1876 (19 U. S. Stat. 141), punishing by fine and imprisonment the fraudulent use, sale and counterfeiting of trade-marks registered in pursuance of the statutes of the United States, on which the informations and indictments are founded in the cases before us.

The right to adopt and use a symbol or device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of the use of that symbol by all other persons, has been long recognized by the common-law and chancery courts of England and of this country, and by the statutes of some of the States. It is a property right for which damages may be recovered in an action at law, and the violation of which will be enjoined by a court of equity, with compensation for past infringement. This property and the exclusive right to its use were not created by the act of Congress and do not now depend upon that act for their enforcement. The whole system of trade-mark property and the civil remedies for its protection existed long anterior to the act of Congress and remain in full force since its passage.

These propositions are so well understood as to need no citation of authorities or elaborate arguments to prove them.

The property in trade-marks and the right to their exclusive use, resting on the laws of the States in the same manner that other property does, and depending, like the great body of the rights of person and of property, for their security and protection on those laws, the power of Congress to legislate on the subject; to establish the conditions on which these rights shall depend, the period of their duration, and the legal remedies for their protection, if such power exist at all, must be found in some clause of the Constitution of the United States, the instrument which is the source of all the powers that Congress can lawfully exercise.

In the argument of these cases this seems to be conceded, and the advocates for the validity of the acts of Congress on this subject point to two clauses of that instrument, in one or in both of which, as they assert, sufficient warrant may be found for this legislation.

The first of these is the eighth clause of section eight of the first article of the Constitution. That section, manifestly intended to be an enumeration of the powers expressly granted to Congress and closing with the declaration of a rule for the ascertainment of such powers as are necessary by way of implication to carry into efficient operation those expressly given, authorizes Congress, by the clause referred to, "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

As the first and only attempt by Congress to regulate the right of trade-marks is to be found in the act to which we have referred, entitled "An act to revise, consolidate, and amend the statutes relating to patents and copyrights," terms which have long since become technical as referring, the one to inventions and the other to writings of authors, it is a reasonable inference that this part of the statute also was, in the opinion of Congress, an exercise of the power found in that clause of the Constitution. It may also safely be assumed that until a critical examination of the subject in the courts became necessary, it was mainly, if not wholly, to this clause that the advocates of the law looked for its support.

Any attempt, however, to identify the essential characteristics of a trade-mark with inventions and discoveries in the arts and sciences, or with the writings of authors, will show that the effort is surrounded with insurmountable difficulties.

The ordinary trade-mark has no necessary relation to invention or discovery. The trade-mark recognized by the common law is generally the

growth of a considerable period of use, rather than sudden invention. It is often the result of accident rather than design, and when under the act of Congress it is sought to establish it by registration, neither originality, invention, discovery, science or art is in any way essential to the right conferred by that act. If we should endeavor to classify it under the head of writings of authors, the objections are equally strong. In this, as in regard to inventions, there is required originality. And while the word writings may be liberally construed, as it has been, to include original designs for engravings, prints, &c., it is only such as are original, and are founded in the creative powers of the mind. The writings which are to be protected are the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like. The trade-mark may be, and generally is, the adoption of something already in existence as the distinctive symbol of the party using it. At common law the exclusive right to it grows out of the use of it, and not its mere adoption. By the act of Congress this exclusive right attaches upon registration. But in neither case does it depend upon novelty, upon invention, upon discovery or upon any work of the brain. It requires no fancy or imagination, no genius, no laborious thought. It is simply founded on priority of appropriation. We look in vain in the statute for any other qualification or condition. If the symbol, however plain, simple, old or well-known, has been first appropriated by the claimant as his distinctive trade-mark, he may by registration secure the right to its exclusive use. While such legislation may be a judicious aid to the common law on the subject of trade-marks, and may be within the competency of legislatures whose general powers embrace that class of subjects, we are unable to see any such power in the constitutional provision concerning authors and inventors and their writings and discoveries.

The other clause of the Constitution supposed to supply the requisite authority in Congress is the third of the same section, which, read in connection with the granting clause, is as follows:

"That Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The argument is that the use of a trade-mark—that which alone gives it any value—is to identify a particular class or quality of goods as the manufacture, produce or property of the person who puts them in the general market for sale. That the sale of the article so distinguished is commerce. That the trade-mark is, therefore, a useful and valuable aid or instrument of commerce, and its regulation by virtue of the above provision of the Constitution belongs to Congress, and that the act in question is a lawful exercise of this power.

It is not every species of property which is the subject of commerce, or which is used or even essential in commerce, which is brought by this clause of the Constitution within the control of Congress. The barrels and casks, the bottles and boxes in which alone certain articles of commerce are kept for safety, and by which their contents are transferred from the seller to the buyer, do not thereby become subjects of congressional legislation more than other property. Nathan v. Louisiana, 8 How., 73. In the case of Paul v. Virginia, 8 Wall., 168, this court held that a policy of insurance made by a corporation of one State on property situated in another, was not an article of commerce, and did not come within the purview of the clause of the Constitution we are considering. "They are not," say the court, "commodities to be shipped or forwarded from one State to another, and then put up for sale." On the other hand, in the case of Almy v. State of California, 24 How., 169, it was held that a stamp duty imposed by the Legislature of California on bills of lading for gold and silver transported from any place in that State to another out of that State, was forbidden by the Constitution of the United States, because such instruments were a necessity to the transaction of commerce, and the duty was a tax upon exports.

The question, therefore, whether the trade-mark bears such a relation to commerce in general terms as to bring it within congressional control, when used or applied to the classes of commerce which fall within that control, is one which, in the present case, we propose to leave undecided. We adopt this course because when this court is called on in the course of the administration of the law to consider whether an act of Congress, or any other department of the government, is within the constitutional authority of that department, a due respect for a co-ordinate branch of the government requires that we shall decide that it has transcended its powers only when that is so plain that we can not avoid the duty.

In such cases it is manifestly the dictate of wisdom and judicial propriety to decide no more than is necessary to the case in hand. That such has been the uniform course of this court in regard to statutes passed by Congress will readily appear to any one who will consider the vast amount of argument presented to us assailing such statutes as unconstitutional, and will count, as he may do on his fingers, the instances in which this court has declared an act of Congress void for want of constitutional power.

Governed by this view of our duty, we proceed to remark that a glance at the commerce clause of the Constitution discloses at once what has been often the subject of comment in this court and out of it, that the power of regulation there conferred on Congress is limited to commerce with foreign nations, commerce among the States, and commerce with the Indian tribes. And while bearing in mind the liberal construction, that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the States means commerce between the individual citizens of different States, there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same State, is beyond the control of Congress.

When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the statute, or from its essential nature, that it is a regulation of commerce with foreign nations, among the several States or with the Indian tribes. If it is not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it is apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress.

We find no recognition of this principle in the chapter on trade-marks in the Revised Statutes. We would naturally look for this in the description of the class of persons who are entitled to register a trade-mark, or in reference to the goods to which the trade-mark should be applied. If, for instance, it described persons engaged in a commerce between the different States, and related to its use in such commerce, it would be evident that Congress believed it was acting under the clause of the Constitution which authorizes it to regulate commerce among the States. So if, when the trade-mark has been registered, Congress had protected its use on goods sold by a citizen of one State to another, or by a citizen of a foreign State to a citizen of the United States, it would be seen that Congress was at least intending to exercise the power of regulation conferred by that clause of the Constitution. But no such idea is found or suggested in this statute. Its language is: "Any person or firm domiciled in the United States, and any corporation created by the United States, or of any State or territory thereof," or any person residing in a foreign country, which by treaty or convention affords similar privileges to our citizens, may by registration obtain protection for his trade-mark. Here is no requirement that such person shall be engaged in the kind of commerce which Congress is authorized to regulate. It is a general declaration that anybody in the United States, and anybody in any other country which permits us to do the like, may, by registering a trade-mark, have it fully protected. So, while the person registering is required to furnish "a statement of the class of merchandise, and the particular description of the goods comprised in such class, by which the trade-mark has been or is intended to be appropriated," there is no hint that it is goods to be transported from one State to another, or between the United States and foreign countries. Section 4,939 is intended to impose some restriction upon the commissioner of patents in the matter of registration, but no limitation is suggested in regard to persons or property engaged in the different classes of commerce mentioned in the Constitution. When we come to the remedies provided by the act for infringement of the rights of the owner of the registered trade-mark, there is no restriction of the right of action or suit, to a case of trade-mark used in foreign or inter-State commerce.

It is, therefore, manifest that no such distinction is found in the act, but that its broad purpose was to establish a universal system of trade-mark registration, for the benefit of all who had already used a trade-mark, or who wished to adopt one in the future, without regard to the character of the trade to which it was to be applied or the locality of the owner, with the solitary exception, that t[illegible] enjoyed in foreign countries which extended no such privileges to us, were excluded from them here.

It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes shall be held valid in that class of cases, if no further. To this there are two objections: First, the indictments in these cases do not show that the trade-marks which are wrongfully used were trade-marks used in that kind of commerce. Secondly, while it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. This precise point was decided in the case of United States v. Reese, 97 U. S., 221, 3 Cent. L. J. 294. In that case Congress had passed a statute punishing election officers who should refuse to any person lawfully entitled to do so, the right to cast his vote at an election. This court was of the opinion that, as regarded the section of the statute then under consideration, Congress could only punish such denial when it was on account of race, color or previous condition of servitude.

It was urged, however, that the more general description of the offence included the more limited one, and that the section was valid where such was in fact the cause of denial. But the court said, through the chief justice: "We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is constitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting words that are not there now. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when as expressed it is general only. * * To limit this statute as now asked for would be to make a new law, not to enforce an old one. This is no part of our duty." If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, namely, make a trade-mark law which is only partial in its operation, and which would

complicate the rights which parties would hold, in some instances under the act of Congress, and in others under state law. Cooley on Const. Lim. 178, 179; Com. v. Hitchings, 5 Gray, 485.

In what we have here said we wish to be understood as leaving the whole question of the treaty-making power of the general government over trade-marks, and the duty of Congress to pass any laws necessary to carry such treaties into effect, untouched.

While we have, in our references in this opinion to the trade-mark legislation of Congress, had mainly in view the act of 1870, and the civil remedy which that act provided, it was because the criminal offences described in the act of 1876 are, by their express terms, solely referable to frauds, counterfeits and unlawful use of trade-marks which have been registered under the provisions of the former act. If that act is unconstitutional, so that registration under it contains no lawful right, then the criminal enactment intended to protect that right falls with it.

The question in each of these cases, being an inquiry whether these statutes can be upheld in whole or in part as valid and constitutional, must be answered in the negative, and it will be so certified to the proper circuit courts.

NOTE.—In Leidersdorf v. Flint, 7 Cent. L. J. 405, these statutes were declared unconstitutional in a case which arose in the United States Circuit Court for the Eastern District of Wisconsin. The power of Congress to legislate on the subject of trade marks was combatted in two articles in this JOURNAL, cited in the opinion in Leidersdorf v. Flint. See 7 Cent. L. J. 143, 163. See, also, 7 Cent. L. J. 198. For opinions and arguments on the other side of the question, see 7 Cent. L. J. 81, 495.

BILL OF EXCHANGE—SIGNATURE TO, BY INDIVIDUAL MEMBER OF FIRM—LIABILITY OF FIRM.

YORKSHIRE BANKING CO. v. BEATSON.

English High Court, Common Pleas Division, April, 1879.

B for many years carried on a business in his own name. He subsequently took M into partnership with him, but the business of the firm was carried on as before in the name of B only, and was under B's sole control. After M became a partner, B indorsed and accepted bills of exchange without the privity of M. The money realized by the bills of exchange went into the banking account, which was still headed as B's account, but B drew out for his own use a larger sum than the amount realized by the bills. The bills being dishonored, the discounters of them, on learning that M was in partnership with B, sought to make M liable on the bills. *Held*, that M was not liable. B's signature on the bills not standing for the firm, but only for B himself; and that to have made M liable, the plaintiffs should have proved that B's signature was meant to represent the firm, and was signed for partnership purposes by the authority of the firm.

These were two actions, the second of which was to abide the issue of the first.

The following were the material facts of the first action:—

The defendant Beatson for many years carried on business by himself at certain works at Rotherham as a chemical manufacturer in the name of "William Beatson." In January, 1878, the defandant Mycock became a partner with Beatson in the chemical works, but this fact was not disclosed to any of the parties concerned in the action. The style of the firm was not changed, for, in accordance with an agreement in the articles of partnership, the business was still carried on in the name of "William Beatson," and was under Beatson's sole control. The partnership articles also provided that neither partner should be at liberty to bind the other by accepting or indorsing bills.

About three months after the commencement of the partnership with Mycock, *i. e.*, about March, 1878, Beatson became the indorsee of the first bill, in respect of which this action was brought. This bill was dated March 6, 1878. Beatson indorsed it to Joseph Carr & Sons, who in their turn indorsed it to the plaintiffs. During the same month of March, 1878, Beatson accepted the second bill drawn by the said Joseph Carr & Sons, and indorsed it to the plaintiffs. This bill was dated March 13, 1878, and was addressed to Wm. Beatson, at the chemical works. Both these bills were dishonored at maturity.

In July, 1878, Beatson presented a petition for the liquidation of his affairs, and then the plaintiffs for the first time discovered that Mycock was in partnership with Beatson. On becoming acquainted with this fact, the plaintiffs sought to make Mycock liable on the two dishonered bills, and made him a joint defendant with Beatson. The latter did not appear to the writ of summons, and judgment was signed against him in default. Mycock defended the action. Prior to January, 1878, when Mycock became a partner, Beatson kept an account at the Sheffield and Rotherham Bank, and after the partnership no change was made in the keeping of the account; it was still kept in the name of "William Beatson." Beatson kept a private cash-book in which he entered his various bill transactions, but he never told Mycock of them, nor did Mycock ever see the book in question.

At the trial Beatson was examined, and stated that the bill transactions were not entered in the partnership books because he considered them private. When pressed as to what had been done with the money, the proceeds of the bills, he said in effect that the firm were, for some reason or other, in want of money, and that he drew on the account at the bank for partnership purposes; but he drew out for his own use a larger sum than was realized by the bills.

The trial took place before Lindley, J., and a special jury. The judge left the following questions to the jury: 1. Was the name of William Beatson put to the bills to denote the firm, or to denote William Beatson only? 2. Did the bank take the bills as the bills of the chemical works, or as the bills of William Beatson only?

The jury found, in answer to the first question, that the bill dated the 13th of March, having been drawn upon William Beatson at the chemical works, must be taken to have been accepted by Beatson on behalf of the firm. As to the bill dated March 6, the jury found that there was no evidence upon the question left to them; but upon being pressed by the judge as to whether the indorsement denoted William Beatson only, or the firm, they said: "that from the fact of the latter bill having been put in connection with the other, they supposed that it must follow the same result."

A verdict was thereupon entered for the plaintiffs in respect of both the bills.

A rule having been obtained for a new trial on the joint grounds of misdirection and the verdict being against the weight of evidence,

Digby Seymour Q. C., and *Tindal Atkinson* for the plaintiffs, showed cause.—Mycock was a dormant partner, and suffered his interests to be carried on under the style of "William Beatson." This being the name of the firm, Mycock was *prima facie* liable. The jury thought so, and their verdict should stand.

Waddy, Q. C., and *Gainsford Bruce* for the defendant, Mycock, in support of the rule.—Two contracts can not arise out of one. Beatson, or Beatson and Mycock, are liable according to whether the signature on the bills indicated the individual or the firm; it can not stand for both. The banks never heard of Mycock at the time they discounted the bills, and could not have supposed the signature on the bills to have stood for any body else than William Beatson. The fact of one of the bills being addressed to the Chemical Works, Rotherham, proves nothing; that was Beatson's own address.

The following authorities were referred to:—Fleming v. McNair, cited in Davison v. Robertson, 3 Dow. 229; Baker v. Charlton, 1 Peake 111; Hall v. West, cited in Lindley on Partnership, 4th ed. vol. 1, p. 343, (n); *ex parte* Buckley, 14 M. & W. 469; South Carolina Bank v. Case, 8 B. & C. 427; *ex parte* Law, 3 Deacon, 541; Nicholson v. Ricketts, 8 W. R. 211; Miles' claim, 22 W. R. 889, L. R. 9 Ch. 635: *ex parte* Bolitho, Buck, 100; Emly v. Lye, 15 East, 7; Bank of Scotland v. Watson, 1 Dow, 40; Lloyd v. Ashby, 2 C. & P. 143; Wintle v. Crowther, 1 Cr. & J. 316; Smith v. Craven, 1 Cr. & J. 500; Furze v. Sharwood, 2 Q. B. 388; Stephen v. Reynolds, 5 H. & N. 513, 8 W. R. C. L. Dig. 9; Cox v. Hickman, 8 H. L. C. 304; Baird's Case, 18 W. R. 1094, L. R. 5 Ch. 725; Edmonds v. Bushel, L. R. 1 Q. B. 97; Shireff v. Wilks, 1 East, 48; Kirk v. Blurton, 9 M. & W. 284; Swan v. Steele, 7 East, 210; Vere v. Ashby, 10 B. & C. 288; Lindley on Partnership, 4th ed. pp. 340, 344; Montagu on Partnership, vol. 1, p. 179; and the following American authorities:—Foster v. Hall, 4 Humphreys; *Re* Warren, 8 Ga. 285; Winship's case, 5 Pick. 11; Boyle v. Skinner, 19 Mo. United States Bank v. Binney, 5 Mason, 183.

Cur. adv. vult.

DENMAN, J., delivered the judgment of the court:

In these two actions, the second of which was to abide the event of the first, the plaintiffs were the holders of bills of exchange. Beatson had allowed judgment to go by default. The question was whether Mycock was liable as Beatson's partner.

The first action was brought upon two bills—one for £276 15s. at four months dated the 6th of March, 1878, drawn by one Kelly on one Wilson, and indorsed "William Beatson;" the other for £484 13s. at four months, dated the 13th of March, drawn by one Carr, addressed to "Mr. William Beatson, Chemical Works, Rotherham," and accepted and indorsed "William Beatson." The bills were discounted by the plaintiffs on the 14th and 18th of March respectively. It appeared that these bills were renewals of earlier bills, originating in accommodation transactions between the defendant Beatson and Carr, Kelly and Wilson; and that the bills were accepted and indorsed by Beatson without the knowledge of Mycock. Before January, 1878, Beatson had carried on the business of a chemical manufacturer at Rotherham. On the first of January, 1878, the two defendants entered into partnership in the said business on the terms that the style of the firm was to be "William Beatson;" that the defendant Beatson should have the whole management of the business; and that neither party should have authority to draw, indorse, or accept bills without the previous consent in writing of the other. The plaintiffs never heard of the existence of any partnership until long after the discount of the bills, *viz.*, on the 17th of July, and knew nothing of Mycock until then. Beatson had then kept an account at the Sheffield and Rotherham Bank for fifteen years. After the formation of the partnership no change was made, either in the heading of his account at the bank, or in the manner of keeping it. It was headed "William Beatson, Esq." The firm had no separate account. The proceeds of the bills went into that account, and Beatson drew on that account from time to time to pay for goods supplied to the business, but his account at the bank was overdrawn, and he had drawn out of the account, for his own purposes, a much larger sum than was brought into the account by the proceeds of the bills in question.

It appears to us that the liability or non-liability of the defendant, Mycock, in this case must turn mainly on the question whether, where the name of a firm is identical with that of an individual member of it, and that individual member accepts or indorses bills of exchange directed to or indorsed by him in his own name, being also that of the firm, these are to be taken to be *prima facie* the bills of the firm, or the bills of the individual member; in other words, on whom is the burden of proof? On the plaintiffs to show that the bill is one which the individual member had authority to draw so as to bind the firm, or on the defendant to show the contrary?

In the case now under consideration, the learned judge put two questions to the jury: First, "Was the name 'William Beatson' put to the bills to denote the firm, or to denote William Beatson only?" Secondly, "Did the bank take the bills as

the bills of the chemical works, whoever their proprietors might be, or as the bills of William Beatson only." The jury found as follows: "The bill dated the 13th of March having been drawn by Joseph Carr & Son upon William Beatson at the address, Chemical Works, Rotherham, we agree that William Beatson's acceptance of it must be held to denote the acceptance of the firm. The bill dated the 6th of March gives no evidence upon the point put by the judge." If the case turned upon whether these findings were satisfactory or not, for the purpose of giving judgment, we should be of opinion they were not, and that even if there was evidence which required to be submitted to a jury at all in the case, there must have been a new trial. The reasons given by the jury show that they were not answering the questions put to them by the learned judge but rather laying down the proposition that Carr addressing the bill to Beatson at the works, and the bill being accepted by him, was evidence that it was a bill intended to be addressed to the firm. and therefore binding upon the firm. The bill was in fact addressed to "Mr. William Beatson, Chemical Works, Rotherham," which was his residence; and we think that this mode of addressing the bill is really no evidence at all against Mycock that the bill was a bill of the firm, or one which the plaintiff had any ground for considering to be a bill binding on any one but Mr. William Beatson personally. The jury being asked afterwards what they said as to the bill of the 6th of March, said that "from the fact of its being put in connection with the other, tney supposed it must follow the same result." Both sides contended that it was not necessary to have left any questions to the jury at all—Mr. Seymour, for the plaintiffs, urging that because "William Beatson" was the firm's name, and the defendant Mycock a sleeping partner in a firm of that name, he was liable, as in an ordinary case of partnership with an ordinary firm's name, such as "A. & C." or "A. & B."; Mr. Waddy, for the defendant, on the other hand contending that "William Beatson" was *prima facie* the name of the man William Beatson, and that it lay on the plaintiff to establish that a bill accepted or indorsed by him in that name was a bill of the firm, and not of the individual. The rule was granted on the ground that the learned judge was wrong in leaving the questions he left to the jury, and that the verdict was against the evidence. But it was also contended upon the the argument for the defendant, Mycock, that he ought to have judgment upon the ground that there was no evidence at all which could properly have been left to the jury in support of his liability and that upon the undisputed facts the judgment ought to have been entered for him. Several authorities were cited on both sides, which we purpose briefly to consider.

The question is stated as follows in the 12th edition of Byles on Bills, p. 48:—"If a man be at the same time a partner in two distinct firms, and each firm use the same style, and he draw a bill in the common name of both, it has been held that an indorsee may charge either firm at his election. But where the name of the firm is the same as the name of the individual, and the bill is drawn by the individual for his separate benefit, perhaps the firm is not pledged." In Wintly v. Crowther Mr. Baron Bayley draws a distinction between the case where a partnership name is pledged and the case of *Ex parte* Bolitho, in which a joint and separate trade was carried on in the name of the same individual. In that case it was held that the firm was not liable unless it could be shown that the bill was drawn as a bill of the firm, and not as a bill of the individual only. On the other hand, in the case of Furze v. Sharwood, where the defendants were trustees to carry on the business of an embarrassed firm, A. M. & K., in the name of M. alone, and they employed M. to carry on the business, it was held, under the particular circumstances of the case, that the indorsements of certain bills indorsed by M. in his own name were *prima facie* the indorsements of the defendants, and that the *onus* of showing that the indorsements were made on account of the separate business, and not on that of the trustees, which was the general and ostensible business, was on the defendants. The court, however, in that case lay stress upon the fact that the bills were discounted with persons who were in the habit of discounting for the firm who had assigned their effects to the defendants, and said that the cases cited (*Ex parte* Bolitho included) were not inconsistent with the view they took of the case under consideration; so that we think that case can hardly be regarded as laying down that in every case the *onus* is upon the defendants, where a bill is drawn by a person whose name is the same as that of the firm to which they belong, to show that the bill is not the bill of the firm. In the present case the only evidence, beyond the bill itself, given to show that it was or was not a bill intended to bind the firm, was the evidence of Beatson himself, who swore that he did not so intend; that the bills in question were not signed by him in respect of any trade transactions, but were accommodation bills, never brought into any partnership book or account. Of course it was competent to the jury to disbelieve Beatson, but unless the *onus* of proof lay upon the defendants, we think that there was no evidence upon which the jury could have found properly for the plaintiffs upon that question, and nothing which could have been properly put to the jury as evidence to contradict Beatson in that respect. The only evidence relied upon by the plaintiffs for the purpose was the fact that Beatson had paid the proceeds of the bills into the account kept in his name at the bank, but inasmuch as that account was always overdrawn, so far as he was concerned, but so far as the business was concerned there was always a balance in hand, we do not think that his improper conduct in raising money on bills for his own purposes, in his own name, can properly be held to have had the effect of binding the partnership, or to amount to evidence that the bills were accepted or indorsed for the purposes of the firm.

Many other authorities were cited from the English reports, none exactly in point, but bear-

ing more or less upon the question whether, in such a case as the present, the presumption is in favor of or against the liability of the dormant partner.

In Emly v. Lye, where one of two partners drew bills in his own name, which he procured to be discounted by a banker through the same agent who had procured the discount by the same banker of bills drawn in the name of the partnership, it was held that the banker had no remedy upon the bills so drawn, though the proceeds were carried to the partnership account, the money being advanced solely on the security of the persons whose names were on the bills by way of discount, and not of loan to the partnership, although the bankers conceived at the time that all the bills were, in fact, drawn on the partnership account. In that case Lord Chief Justice Ellenborough said: "Nothing passed from the defendants to induce the plaintiff to believe that it was a partnership concern, and to lend his money on that account." Mr. Justice Grose adds: "At the time when the discount took place the partnership had made no contract with the discounter, who, therefore, must be taken to have purchased the bills of the one partner only." Mr. Justice Le Blanc says: "To charge the defendants on these bills they must appear to have been drawn for and on account of the partnership;" and Mr. Justice Bayley says: "There was no contract between the parties at the time." This case appears to us to be strong to show that where no credit is given to a partnership on the face of the bill, the presumption of law must be that the individual signing the bill is the only person liable for it, in the absence of express proof of authority from his partners to bind the firm by bills given in his own name, as well as of the particular bill being, in fact, a bill signed for the purposes of the partnership. The case of The South Carolina Bank v. Case, which was strongly relied upon by the plaintiff's counsel, appears to us not to assist the plaintiff in the present case, because there the transaction in question was in its commencement one entered into for the partnership under such circumstances as to make them liable for the dealings of the individual member. It has been doubted whether that case was rightly decided (see Miles' Claim), but it is enough to say that it turned upon the question whether the individual who signed the bills had, at the time he signed them, an authority to pledge the credit of the firm by an indorsement in his own name (see *per* Mr. Baron Bayley in Smith v. Craven); and the case was one in which the bills were not accommodation bills, as in the present case, as between the party whose signature was relied upon and the other original parties to the bills.

In Stephens v. Reynolds, it was held that where A. and B. carried on business in partnership in the name of B., and A. accepted a bill in B.'s name for goods supplied to the partnership, B, was liable, though the bill was not addressed to the place where the partnership business was carried on, but to a place where he carried on a separate business. There is some difficulty in understanding the report of that case, and Mr. Baron Bramwell did not agree with the judgment pronounced; but it does not assist us, because it is clear that the main ground of the decision of the majority of the judges was that the bill had been accepted for goods supplied to the firm. The case of Edmonds v. Bushell, was not a case of partnership, but a partnership name was used where the whole business was the business of the defendant, so that the persons advancing money on the bills were necessarily led to suppose that they were advancing money to a collection of persons in business, or on the faith of a business being carried on, and not, as in this case, without anything to lead them to suppose that they were dealing with the individual only whose name appeared on the bills. Swann v. Steele is also a case in which the bills sued upon were accepted in a partnership name properly so called, and is not, therefore, in point. Vere v. Ashley is open to the same observation; so also is the case of McNair v. Fleming, cited by Lord Redesdale in 3 Dow. 229. In the last edition of Lindley on Partnership, p. 342, the learned author lays down the law as follows: "Again, persons may carry on business in partnership in the name of one of themselves, and, if they do, they will be liable on bills accepted by him in that name, if it was, in fact, used to denote all the partners, but not otherwise." This does not mean that the liability of the firm depends simply upon the question whether the person accepting has, in his own mind, an intention of improperly making his partner liable on bills accepted for his own accommodation. The meaning is that the firm will be bound, if the bill was given for a partnership purpose, and for what purported to be a partnership purpose, and was not known to be otherwise by the person taking the bill. This statement, moreover, only applies to ordinary trading partnerships which are *prima facie* bound by bills given by one partner in the name of the firm. The learned judge himself having read this judgment has authorized us to give this explanation of the passage in question.

We think there is great force in Mr. Waddy's argument that if the mere fact that there is a partnership carried on in the name of one partner were to make the firm liable for all bills accepted by that partner, it would be possible for him to bind his partner to an unlimited extent for all his own private debts, unless the partner could show affirmatively, facts which should disentitle the plaintiffs who never heard of his existence to make him liable upon the bill. It may, no doubt, be said that it is his own fault for allowing his partner to carry on business in his own name. But this seems to us to be no ground for making the innocent partner liable for debts incurred by the guilty partner, wholly for his own purposes and not for the benefit of the partnership, in a case where the name used in no way invites the person advancing money on the bills to consider that there is any plurality of persons undertaking the liability, and where there are no circumstances to lead that person to suppose that he is dealing with a firm. In Mile's Claim, Lord Justice James

states the law as follows: "It is the law of this country, and it has always been the law of this country, that nobody is liable upon a bill of exchange unless his name, or the name of some partnership or body of persons of which he is one, appears either on the face or on the back of the bill." We think that is a true statement of the law, subject only to the qualification that in cases where a partnership is carried on in the name of an individual, without a partnership style, and it is affirmatively proved that the bill in question is one executed for partnership purposes, or with the authority of the partners, the name of the individual may have the same effect as the name of a partnership or body of persons in ordinary cases has without such proof. In America it has long since been decided and uniformly held that where the name of one partner is identical with that of the firm, the burthen of proof is upon the plaintiff to show that the bill is the paper of the firm and not of the individual partner. Parsons on Bills of Exchange, p. 131, so states the law, and it was so laid down by the Supreme Court of New York in Oliphant v. Matthews, 16 Barb. 210, and by Mr. Justice Story in United States Bank v. Binney, 5 Mason, 183, who explains the law as follows: "Where the contract is made in the name of the firm it will *prima facie* bind the firm unless it is *ultra* the business of the firm. Where the firm imports on its face a company as A. B. & Co., or A. B. & C., there the contracts made by the partners in that name bind the firm unless they are known to be beyond the scope and business of the firm. But where the business is carried on in the name of one of the partners, and his name alone is the name of the firm, it is necessary, not only to prove the signature, but that it was used as the signature of the firm by a party authorized to use it on that occasion and for that purpose. In other words, it must be shown to be used for partnership objects, and as a partnership act." See also Story on Partnership, sections 106 and 142.

We think that this is in accordance with the true principles of the law of agency of which the law of partnership is a branch, and that the weight of English authority is in favor of the American view of the law. Mr. J. A Russell, in the 11th edition of Chitty on Bills, lately published by him, p. 37, states the law correctly, as we think, to the same effect.

We are of opinion, then, that this was a case in which the plaintiffs were bound to prove the defendant's liability on the bills in question by proving something more than that the defendant was a partner in business with Beatson. It is not indeed argued on behalf of the plaintiffs that there was evidence in the case that the proceeds of these bills were applied for the purposes of the firm, and of such a dealing between the defendants as that an authority might properly be inferred. If we thought this was so, we should still have thought it necessary, owing to the manner in which the questions were put and answered by the jury, to have made the rule absolute for a new trial; but, for the reasons given above, we are of opinion that there was no evidence at all proper to be submitted to the jury in favor of the plaintiff's contention. The bills were clearly accommodation bills for Beatson's benefit; there was nothing on the face of them to indicate that any but Beatson was to be bound. The only evidence given as to the intention to bind Mycock was against such intention, and there was no general or special authority to Beatson to draw bills, or evidence of a mutual intention that Mycock should be so bound.

Under these circumstances we feel bound under the power given to us by Ord. 40, r. 10, to enter judgment for the defendant Mycock, with costs, and to set aside the judgment for the plaintiffs as against him.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF KANSAS.

July Term, 1879.

[Filed Oct. 14, 1879.]

SCHOOL LANDS—ACTUAL SETTLERS.—Under the laws of Kansas, actual residence is required to enable a person to purchase, to the exclusion of others, a particular piece of the school lands in the State. This is inferred from sections 4, 5, 6 and 20. of article 14, chapter 122, of the laws of 1876, comp. laws of 1879, pp. 854, 857, sections 195, 196, 197 and 211, which provide for only persons who have "settled upon and improved," or who are "actual settlers upon such lands, purchasing the same to the exclusion of others." Reversed. Opinion by VALENTINE, J. All the justices concurring.—*Bratton v. Cross.*

SURFACE WATER— EMBANKMENTS. — The simple fact that the owner of one tract of land raised an embankment upon it which prevents the surface water falling and running upon the land of an adjoining owner from running off said land, and causes it to accumulate thereon to its damage, gives to the latter no cause of action against the former; nor is the rule changed by the fact that the former is a railroad corporation and its embankment raised for the purpose of a railroad track, nor by the fact that a culvert could have been made under said embankment sufficient to have afforded outlet for all such surface water. Reversed. Opinion by BREWER, J. All the justices concurring.—*Atchison, etc. R. Co. v. Hammer.*

MECHANIC'S LIEN — ACTION FOR FORECLOSURE. —1. One who would create and enforce a mechanic's lien upon a building must proceed according to the statute, and if after taking the proper steps for filing his lien, he commences action thereon before or after the time authorized by statute, no decree foreclosing the lien will be awarded. 2. An action foreclosing a mechanic's lien will not lie until sixty days after the completion of the building or improvement, and that notwithstanding earlier payment was stipulated for, and though action might be maintained for the money promised immediately upon failure of payment at time agreed upon. 3. Where pending the erection of a building the owner ceases work and loses title, and the party acquiring the title proceeds with the work as regularly as the prior owner and completes the build-

ing commenced by such owner, a contractor under such owner can not elect to consider the building completed at the time of the transfer of title and file and foreclose his lien accordingly. Reversed. Opinion by BREWER, J. All the justices concurring.—*Perry v. Conroy.*

SUPREME COURT OF INDIANA.

November, 1879.

CO-ADMINISTRATOR—LIABILITY ON BONDS JOINT IN FORM—CO-SURETYSHIP.—Action by appellant, as administratrix, against her co-administrator, Wyant, and their joint securities, upon an administrator's bond, the condition of which was as follows: "The condition of the above obligation is that if the above bound Benjamin Wyant and Maria Wyant shall faithfully discharge the duties of this trust as administrator of the estate of Jacob Wyant, deceased, according to law, the above obligation is to void," etc. The question presented in the case is whether Maria Wyant could maintain an action on the bond, in which she was a principal obligor, against her co-obligors therein, after Benjamin Wyant had resigned his trust, to recover damages for a breach committed by him alone of the condition of the bond. *Held*, that the evident meaning of the statute is that where two or more persons are appointed administrators of a decedent's estate, each of said persons shall execute a separate bond for the faithful discharge of his duties, and that the bond in suit must thereupon be construed as the separate bond of each. This being the case, Maria Wyant is not a surety on the separate bond of Benjamin Wyant, and is neither a proper nor a necessary party defendant to a suit on his separate bond to recover damages for breaches committed by him alone. After Benjamin's resignation it became the duty of Maria, as the remaining administrator of the estate, to complete the administration thereof, and in the discharge of this duty she was expressly authorized to maintain this action on the separate bond of said Benjamin against him and his sureties therein. Braxton v. State, 25 Ind. 82; Prichard v. State, 34 Ind. 137; Moore v. State. 40 Ind. 558, overruled, so far as they conflict with this decision. Judgment reversed. —*State v. Wyant.*

JUSTICE OF THE PEACE—JUDGMENTS — EXECUTIONS—WHEN VOIDABLE. — Proceedings and judgments before justices of the peace are not required to have that formality which would be expected in higher courts. A judgment by a justice showing that the defendant appeared and confessed judgment for the amount stated is good as between the parties, and is only void as to creditors of the judgment defendant, for want of affidavits that the defendant justly owed the debt. The provision requiring that before an execution shall issue upon a judgment taken before a justice, a transcript of which has been filed with the clerk of the circuit court, the plaintiff shall file his affidavit that the judgment is impaired in whole or in part, is for the benefit of the defendant, and an execution issued without such affidavit is voidable but not void. A purchaser under it acquires a good title, even if he had notice of its voidable character. The defendant may, if he moves in time, have the execution set aside for the want of the affidavit; but if he neglects to do so, proceedings under it will be as valid as if the affidavit had been filed. Freeman on Executions, sec. 29. Affirmed.—*Marity v. Eastridge.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

October, 1879.

MORTGAGE—FIXTURES.—Where the defendant delivered to S, the owner of a machine shop, an Exeter sectional boiler to be used on trial at said machine shop which boiler, by agreement was to remain the personal property of the defendant till paid for; was placed in said building by S for the purpose of furnishing the motive power for the machinery; was firmly attached to the land; was in connection with the steam engine, shafting and machinery adapted to said machine shop and essential to the enjoyment and use of the building for the purpose for which it was intended, and S, not having paid for said boiler, subsequently made a mortgage to the plaintiff of said building and the real estate, including said boiler in express terms, the plaintiff having no notice of the defendant's claim until after the delivery of said mortgage deed, and said mortgage was foreclosed for breach of condition, it was *held*, that said boiler became a part of the realty and passed to the plaintiff by its mortgage. McLaughlin v. Nash, 14 Allen, 136; Pierce v. George, 108 Mass. 76; McConnell v. Blood, 123 Mass. 47. Opinion by MORTON, J.—*Southbridge Sav. Bank v. Exeter Machine Works.*

FOREIGN JUDGMENT — JUSTICE OF THE PEACE—JURISDICTION. — A judgment of a justice of the peace of another State is conclusive if it is duly proved and if the justice has jurisdiction to render it. But nothing can be presumed in favor of the jurisdiction of courts or magistrates having only a special or limited jurisdiction. The record should show that the judgment was within the limits of their jurisdiction. Hendrick v. Whittemore, 105 Mass. 23, Wells v. Stevens, 2 Gray, 115; Sayles v, Briggs, 4 Metc. 421; Nye v. Kellam, 18 Vt. 544; Wright v. Fletcher, 12 Vt. 431. 2. Where, therefore, it appeared that by the statutes of Vermont "a justice is authorized to accept and record a confession of any debt to a creditor made by the debtor personally, either with or without antecedent process, as the parties shall agree and render judgment on such confession," and the record of a justice, put in evidence, showed that the defendant appeared personally before the justice without antecedent process and acknowledged the debt to be due to the plaintiff, but it did not show that he agreed that such acknowledgment should be taken as a confession of judgment or that judgment should be rendered thereon without antecedent process—in a suit upon such judgment in the superior court here, it was rightly *held*, that the justice of the peace had no jurisdiction, and judgment was properly ordered for the defendant. Opinion by MORTON, J.—*Henry v. Estis.*

SUPREME COURT OF ILLINOIS.

[Filed at Ottawa, October, 1879.]

DAMAGES NEGLIGENCE — OVERFLOWING WATER —FREEZING.—This was an action against the Chicago & Northwestern R. Co. to recover damages for causing and permitting water to flow and escape from a water tank of the defendant upon premises of the plaintiff. The plaintiff recovered below. It seems that plaintiff owned land in the vicinity of the water tank of defendant upon which he kept a stock of lumber; that during the winter of 1875 the water was

permitted to escape in large quantities from the tank, through the overflow pipes. The water ran upon the land of plaintiff and froze there. The suit respects the damages resulting from this formation of ice to lumber and material, SHELDON, J.: "That considerable damage resulted to appellee from the freezing upon his premises of water which flowed thereon from the water tank of the company is established by the proof. It appears, too, that the damage was sustained in consequence of the freezing and the detention thereby of the water; that but for that the water would have flowed down and off the premises without injury. It is claimed that the damage was not the proximate result of the defendants act of turning the water upon the land, but of the freezing of the water which was the act of God. But to claim exemption from liability for the consequences of such an act of nature it must be such as could not have been foreseen and prevented by the exercise of any care and prudence. Nugent v. Smith, 3 Cent. L. J. 611; L. R. 1 C. P. D. 423; Panton v. Norton, 18 Ill. 496. Appellant must be held to have known that the water would freeze upon appellee's land at the time it was turned on it, it being a fact occurring in the course of nature, and be chargeable with the consequences resulting from the known action of frost in freezing water in combination with appellants own act. The injury was one which might reasonably and naturally have been expected to result." Judgment reversed.—*Hoag v. Chicago, etc. R. Co.*

NOTE—GUARANTY BY THIRD PARTY — LIABILITY ASSUMED BY GUARANTOR. — This was an action brought before a justice of the peace against defendant as indorser and guarantor of a promissory note, which resulted in a judgment for plaintiff. On appeal to the circuit court, the verdict and judgment were in favor of the plaintiff. To reverse this, the defendant appeals to this court. The facts are substantially that these parties had dealings together, the result of which was that appellant was found in debt to appellee in the sum of five thousand dollars, and for which he gave appellee his note. This note was afterwards taken up and another note given, upon the back of which appellant wrote his name. When suit was brought upon the note this writing above appellant's name was placed upon it by appellant's attorney: "For value received, I hereby assign the within note to Paul L. Saulter, and guarantee the payment thereof." SCOTT, J., says: "The question is what did appellant intend when he put his name on the note? Was it his intention to guarantee the payment of the note, or only to transfer the title, he himself being liable as assignor only. * * * * The question for the jury was, did appellee indorse this note for the sole purpose of transferring the title, or with a guarantee of ultimate payment of the note by himself? If the latter, the guarantor becomes liable if the money is not paid according to the terms of the guaranty." Affirmed. SHELDON, J., dissenting, says: "The conclusion reached here may perhaps be justified, on the ground that as parol evidence was entered into without objection by both sides to show what was the liability assumed, the question as to the incompetency of such evidence might be considered as having been waived. But I wish to express my dissent from any inference which may be drawn from the opinion, that parol evidence is admissible to show what liability was intended to be assumed by the indorsement in blank of the payee of a promissory note. Whenever the payee of a promissory note indorses it in blank, there is a certain and well known legal import attached thereto that it is a contract of indorsement and not one of guaranty or other kind. In such case, the liability intended to be assumed appears from the writing itself, and can be barred by parol no more than could have been the contract which the law imports had it been written out in words. This, I had understood as having been settled by the more recent decisions of this court, especially by Mason v. Burton, 54 Ill. 349; Beattie v. Browne, 64 Ill. 360; Jones v. Albee, 7 Ill. 34; Skelton v. Dustin, decided at the January term, 1878, 8 Cent. L. J. 176. Such are the decisions elsewhere. Dale v. Gear, 38 Conn. 15; Woodward v. Foster, 18 Gratt. 200: Charlis v. Dennis, 42 Wis. 56; Coon v. Pruden, 24 Minn.100; Rodney v. Wilson, 67 Mo. 100. It is a different case where one not a party to a note writes his name on the back of it. There, under our decisions, it may be shown by parol what was the liability intended to be assumed. There is in that case no such certain and well known contract implied by the law as there is where the payee indorses it in blank. The distinction is pointed out in the case in 18 Gratt. The doctrine which would permit the legal import of the indorsement in blank of the payee of a note to be varied by parol evidence and so be made liable to be thus converted into a contract of guaranty or other kind, I should regard as dangerous and pernicious in effect upon commercial paper, as not sound in principal and as opposed to all the better authority." CRAIG. C. J., and DICKEY, J., concur.—*Worden v. Salter.*

BOOK NOTICES.

CASES DECIDED IN THE SUPREME COURT OF MICHIGAN at the January and April Terms, 1879. HENRY A. CHANEY, State Reporter. Vol. 40. Lansing: W. S. George & Co. 1879.

REPORTS OF CASES ARGUED AND DETERMINED in the Supreme Court of the State of Wisconsin, with tables of the cases and principal matters. O. M. CONOVER, Official Reporter. Vol. 46. Chicago: Callaghan & Co. 1879.

CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES. October Term, 1878. Reported by WILLIAM T. OTTO. Vol. 8. Boston: Little, Brown & Co. 1879.

The fortieth volume of the Michigan reports is unusually large, containing, with the index and table of cases, nearly 850 pages, and an unusual number of interesting and important cases will be found within its covers. Many of these have already appeared in these columns, but the following decisions we have, we believe, not yet noted: Damages for failure to perform a contract to procure the discharge of a mortgage can not be claimed, if it does not appear that the mortgage was foreclosed or the claimant damnified. *Rose v. Jackson*, p. 31. A resolution of appointment is not a contract and may be withdrawn or altered before acceptance. *Kalamazoo Manf. Co. v. Macalister*, p. 84. A note written by plaintiff's attorney before suit, and expressing the opinion that defendant is not liable, is not admissible in evidence for the defense. *Farmers Mutual Insurance Co. v. Bowen*, p. 147. A deposition is not inadmissible merely for being transmitted in a gummed envelope, if it has not been tampered with. *Van Sickle v. Gibson*, p 170. A deposition does not need a separate *jurat*, if the commissioner who took it certifies that the deponent was duly sworn. Id. An unsigned affidavit for a transcript of execution is valid if properly sworn to. *Merrick v. Mayhue*, p. 196. The measure of damages

for putting up a steam boiler with such defects as to make it worth less than the contract price, is the difference between its value in its defective condition and its value if completed in compliance with the contract. *White v. Brockway*, p. 209. In an action involving the settlement of accounts, figuring done by one of the parties when they were trying to settle is admissible as *res gestæ*. *Bennett v. Smith*, p. 210. A leading question points out the desired answer and does not merely call for an affirmative or negative. *McKeown v. Harvey*. Unpublished manuscripts are not leviable property. So *held* of a set of abstract books. *Dait v. Woodhouse*, p. 399. It is "extreme cruelty" to a wife for her husband openly to consort with and express his preference for loose females. *McClung v. McClung*, p. 493.

The forty-sixth Wisconsin reports contains about 750 pages, and fewer cases than the volume just examined, the opinions being generally of greater length. We observe no decisions of general interest which we have not heretofore referred to. The eighth volume of Otto's United States Supreme Court Reports, has less than 700 pages.

Having examined these three volumes together with some care, we have come to the conclusion that in so far as the work of the reporters and publishers is concerned the honors are by no means evenly divided. Mr. Chaney's *syllabi* and index are much better than those of the other two. The Wisconsin reporter gives too much space to his statement of facts preceding the opinions and to briefs of counsel. On the other hand Mr. Otto pays very small attention to the former; this we believe has been a subject of complaint ever since the appearance of his first volume. As regards the mechanical execution—the paper, the press work and binding—the 98th U. S. takes the first place, with the 40th Wisconsin and the 46th Michigan, a very poor second and third.

QUERIES AND ANSWERS.

QUERIES.

46. WHERE A MARRIAGE HAS BEEN, on judicial inquiry, established from the sole fact of cohabitation as man and wife, there being in reality no formal marriage, can the husband, marrying a second wife in this State during the life of the first, and without a divorce, be held for bigamy? G.

Maryville, Mo.

47.—A CONTRACTS WITH B to sell him his farm. He wants $25 *bonus* money down. B is unwilling to pay the money to A, but will deposit it with C, to be paid to A when A shall have performed a particular part of the contract, which is to be done in a reasonable time. A, unwilling that the money be deposited with C, selects D, and urges that the money be left with him. B finally agrees and leaves the $25 with D, to be paid as above. Within a reasonable time A performs the part of the contract specified, but D has absconded with the money. Is D A's agent or B's bailee or both? Can A recover the money from B? H. J. C.

48.—A SUED B AND ATTACHED HIS property, giving bond with D and E as sureties, conditioned that A would pay B all damages sustained from the levy of the attachment, if the same were illegally and unjustly sued out. A failed in such suit. B now sues on said bond and seeks to recover, actual and vindictive damages of A, D and E. Can B recover vindictive damages in suit on bond? Can he recover such damages of D and E as sureties? If so, what is the measure of such damages the penalty of the bond, or as in other cases. K. & C.

49. THE FOLLOWING NOTE is executed: "$100. Leavenworth, Kas., Jan. 1, 1879. Six months after date I promise to pay to the order of John Doe, one hundred dollars for value received. This note is not negotiable. (Signed) Richard Roe." A printed form is used, but the date, amount, time of maturity, payer and words "This note is not negotiable," and the signature are all written in. The note is indorsed without recourse to an innocent purchaser before due. The question is, whether the note is negotiable, or is it subject, in the hands of the innocent holder, to all defenses existing between payer and payee. Can any of your subscribers refer me to authorities? S.

ANSWERS.

No. 43.

[9 Cent. L. J. 439.]

"An execution issued by a justice of the peace, and not returnable according to law, is not merely erroneous, but is void." Stevens v. Chouteau, 11 Mo. 382; 5 Wend. 276; 9 Wend. 388; 16 Vt. 393. The execution being absolutely void it would seem that the constable incurred no liability by his failure to execute the writ.

Linneus, Mo. N. & B.

NOTES.

The President has sent to the Senate the nomination of Hon. George W. McCrary to the circuit judgship vacated by Judge Dillon. The selection has just been approved by a large meeting of the bar at Mr. McCrary's home, and is indorsed by the press of both parties in the State.—— Samuel Reber, one of the foremost and best known members of the bar of this city, died suddenly at Cincinnati on the 1st inst. The deceased lawyer was born in Ohio in 1813, and began the practice of the law in St. Louis in 1840. He was for some time a judge of the Court of Common Pleas and Circuit Court of this city, which latter position he resigned before the close of his term. Among other positions to which his legal knowledge called him were those of city counselor and professor of equity in the Washington University Law School. His health had been failing for some time.——The death is announced in England of Edward William Cox, Sergeant at Law, in his 70th year. He was called to the bar in 1843, and in 1857 became recorder of an English town. But he was more distinguished as a journalist than as a lawyer. Sergeant Cox was the proprietor of *The Law Times*, and of *The Field* and *Queen* newspapers. *The Law Times* was under his editorial supervision. He was also the author of "The Advocate," published in 1852, and other popular works relating to legal subjects.——The President's message calls the attention of Congress to the arrears in the business of the Supreme Court of the United States, and on the circuits. The remedy suggested is the appointment of additional circuit judges, and the creation of an intermediate court of errors and appeals.